UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

PHILLIP MCNEAL,

Plaintiff,

v. **Civil Action No. 2:09-0306**

NELSON BROTHERS, LLC, a Delaware Limited Liability, CATENARY COAL COMPANY, LLC, a Delaware Limited Company, EXPLO SYSTEMS, INC., a Louisiana Corporation, ELITE COAL SERVICES, LLC, a West Virginia Limited Company, and JOHN DOE, Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending are two motions for summary judgment, one filed on March 12, 2010, by Catenary Coal Company, LLC ("Catenary"), and the other filed on May 14, 2010, by Explo Systems, Inc. ("Explo"). Explo's motion for summary judgment was joined by Catenary and Nelson Brothers, LLC ("Nelson"), on February 23, 2011, and by Elite Coal Services, LLC ("Elite"), on February 24, 2011.

This action was previously referred to Mary E. Stanley, United States Magistrate Judge, who submitted her Proposed Findings and Recommendation ("PF&R") pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) on February 24, 2011. The magistrate

judge recommends that both of the motions for summary judgment be granted and that all charges against defendants be dismissed. On March 8, 2011, plaintiff, acting pro se, objected to the PF&R.

I.

Plaintiff was employed by Catenary as a rock truck driver from 1993 until October 5, 2009.[1] In November 2006, the United States Army contracted with Explo to demilitarize munitions and to do so at Catenary's coal mine. These munitions contained the chemical 2,4,6-trinitrophenyl-methylnitramine ("tetryl"). Apparently, tetryl was inserted into pre-dug holes in the ground, along with other explosives to destroy the munitions. The resulting explosions had the collateral benefit to Catenary of blasting away the top layer of soil and rock, known as overburden, enabling miners to reach the coal that lay just beneath the ground surface. Tetryl was used at the mine in this manner from December 2006 to February 2007.

In February 2007, plaintiff received a copy of materials from the Occupational Safety & Health Administration discussing the dangers of tetryl. This information "scared [him]

[1] The facts set forth herein are drawn from the PF&R's proposed factual findings, to which neither party objected.

to death." (Explo's Mot. for Summ. J., Ex. B, P. McNeal Dep. at 85:4-5). Later, plaintiff came to believe that he had been exposed to tetryl as a rock truck driver for Catenary and that the alleged exposure was responsible for various illnesses and health problems he had endured. Plaintiff believes that the loads of overburden and dirt that he hauled and dumped contained tetryl, that the roads he drove over contained tetryl, and that the dust that seeped into the cab of his truck contained tetryl. During his deposition, plaintiff was unable to testify with certainty as to the frequency and intensity of any exposure to tetryl. Nor has he been able to determine whether he was exposed to quantities of tetryl exceeding federal safety regulations.

On March 6, 2009, plaintiff initiated this action in the Circuit Court of Kanawha County. Defendants thereafter timely removed. In his amended complaint, plaintiff alleged that defendants Nelson, Explo, and Elite had contracted with Catenary for various services related to the munition-destruction process. The complaint asserted six claims against these four entities: Count I - Negligence; Count II - Deliberate Intent; Count III - Strict Liability; Count IV - Fraud; Count V - Medical Monitoring; and Count VI - Intentional Infliction of Emotional Distress ("IIED"). By order entered September 18, 2009, Counts II and IV

were dismissed with prejudice as to Explo and Catenary. On February 23, 2010, Count II was also dismissed as against Nelson.

Shortly thereafter, defendants filed the dispositive motions now at issue. Specifically, on March 12, 2010, Catenary moved for summary judgment on the basis that plaintiff's remaining claims against it (Counts I, III, V, and VI) were barred by West Virginia's workers' compensation program. On May 14, 2010, Explo moved for summary judgment, contending that plaintiff's failure to identify an expert witness required dismissal of the remainder of his complaint. Explo maintains that, inasmuch as plaintiff had failed to identify any expert witness to prove causation, he could not offer "sufficient evidence that he was either exposed to tetryl, or that exposure caused him to suffer any alleged damages." (Explo's Mem. in Supp. at 1). Accordingly, Explo asserts that plaintiff cannot maintain his claims of negligence, strict liability, medical monitoring, or IIED.[2]

On August 3, 2010, after plaintiff's counsel withdrew from representation of him, the court referred this action to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). On

[2] As mentioned, defendants Nelson and Elite joined Explo's motion on February 23 and 24, 2011, respectively.

September 23, 2010, the magistrate judge conducted an hour-long status conference, notifying plaintiff about the requirements of the discovery and summary judgment processes, his burden of proving causation, and the necessity of obtaining an expert witness. The following day, the magistrate judge temporarily stayed the matter until December 1, 2010, so that plaintiff could respond to the pending dispositive motions. After plaintiff failed to so respond, the magistrate judge conducted a second status conference on December 10, 2010. The magistrate judge again explained the requirements of Federal Rule of Civil Procedure 26 with regard to expert witness reports. The plaintiff was given until December 31, 2010, to file an expert witness report that complied with Rule 26.

On January 3, 2011, plaintiff submitted what he deemed to be an expert witness report prepared by Dr. Gideon Letz. The report consisted of, among other things, a two-page letter from Dr. Letz to plaintiff (the "January 3 letter"), wherein Dr. Letz indicated that he had "completed a review of the records regarding [plaintiff's] exposure to Tetryl during the course of [his] employment." (January 3 Letter at 1). Dr. Letz also reported in the January 3 letter as follows:

> Given your description of the dust exposure . . ., it is certainly likely that you [plaintiff] suffered

> some upper respiratory, bronchial and nasal irritation given the timing of your symptoms in relation to the exposure. You had no evidence of pulmonary damage or asthma at the time of your evaluation which was some weeks after last exposure so it is not likely that you will have any ongoing respiratory or allergic symptoms related to your mining work.
>
> The skin rash on your arm and ribs that was observed at the time of your evaluation [on March 16, 2007 by Dr. Chuang Fang Jin] is not typical of that seen by workers exposed to Tetryl and is therefore unlikely to be related.
>
> In regard to your ongoing symptoms of tremor, it is my medical opinion that this condition is unlikely related to your exposure to Tetryl dust. Such symptoms have never been reported in workers who have had longer duration and more direct exposure to Tetryl.

(Id. at 1-2). Included with the letter was a copy of Dr. Letz's curriculum vitae, a description of his fee structure, a list of his publications, and a testimony list.

On January 14, 2010, the magistrate judge ordered that plaintiff respond to the pending motions for summary judgment by January 28, 2011. On January 20, 2010, plaintiff provided additional materials from Dr. Letz but did not respond to the motions. Instead, he simply noted, "I feel confident that I have met all of the requirements to continue my case. Enclosed is a written report from Dr. Gideon Letz . . ., who meets the requirements for an expert witness. In this report . . ., Dr. Letz clearly states that he feels that I was exposed to hazardous

levels of Tetryl during my employment . . . ." (Plaintiff Letter at 1).

The additional material referenced by plaintiff was a second two-page letter from Dr. Letz (the "January 20 letter"). Dr. Letz indicated in the January 20 letter that plaintiff, during a recent telephone conversation, had provided additional information regarding his symptoms and that, as a result, Dr. Letz had "a more complete picture of the nature and extent of [plaintiff's] exposure to Tetryl." (January 20 Letter at 1). Specifically, Dr. Letz asserted that he believed plaintiff "had significant exposure meaning that [plaintiff] more likely than not had skin contact, inhalation of dust and possibly oral exposure (swallowing dust) of a degree sufficient to cause acute health effects including mucus membrane and upper respiratory irritation and possibly lung damage." (Id. (emphasis in original)). Dr. Letz noted, however, that most health effects resulting from such exposure "would be expected to completely resolve within a few weeks after cessation of exposure." (Id.). Dr. Letz then proceeded to examine each of plaintiff's asserted symptoms:

> Your persistent fatigue is not easily explained. One possibility is that you suffered some subtle lung damage at the time of exposure that has resulted in persistent pulmonary impairment. This could be further

> evaluated with complete pulmonary function testing including measured lung volumes and DLco (diffusion capacity for carbon monoxide). The symptom of fatigue might also be explained by the anxiety and depression that has resulted from your health and financial concerns.
>
> After a thorough review of the human and animal toxicology of Tetryl, I can find no information that would link your shaking and tremor to Tetryl exposure. Even workers exposed to high levels of Tetryl . . . showed no evidence of neurological toxicity. The most likely explanation for these symptoms is that you have coincidentally developed idiopathic "essential tremor."
>
> . . .
>
> In summary, I can conclude that you were exposed to hazardous levels of Tetryl . . . . Your symptoms at the time of exposure (respiratory irritation with cough, nausea and fatigue) are consistent with what is published in the medical literature. At this point, there is insufficient information to establish whether or not your persistent symptoms of fatigue and tremor have any causal relationship to your Tetryl exposure in the past.

(Id. at 1-2).

On February 24, 2011, the magistrate judge issued her PF&R, recommending that each of the pending motions for summary judgment be granted. The magistrate judge first concluded that plaintiff's claims against Catenary were barred by the workers' compensation program, as set forth in West Virginia Code §§ 23-2-6 and 23-4-2(d)(ii). (PF&R at 12). Turning to plaintiff's claims against Nelson, Explo, and Elite, the magistrate judge then determined that plaintiff had failed to make an evidentiary

showing sufficient to establish the element of causation, an element necessary to each of his remaining claims. (PF&R at 15-17). The magistrate judge observed that Dr. Letz's reports "fail to meet the requirement of Fed. R. Civ. P. 26(a)(2)(b)(I), inasmuch as any findings therein are conclusory."[3] (PF&R at 15). The magistrate judge further noted that, "[e]ven viewed in the light most favorable to the plaintiff, it is hard to say that the reports support even the insufficient mere possibility of causation, and they fail to include any discussion of the frequency and intensity of the plaintiff's exposure to tetryl." (Id.). Accordingly, the magistrate judge recommends that summary judgment be granted in defendants' favor.

As mentioned, plaintiff objected to the PF&R on March 8, 2011. Plaintiff's objections concern only his claims against Nelson, Explo, and Elite. Plaintiff does not object to the magistrate judge's recommendation that his claims against Catenary be dismissed as barred by the workers' compensation system. Having reviewed the matter de novo, the court finds that the recommended disposition with respect to the claims against Catenary is correct. The court, accordingly, concludes that

[3] Rule 26(a)(2)(B)(i) requires that the report of an expert witness include "a complete statement of all opinions the witness will express and the basis and reasons for them."

Catenary is entitled to summary judgment. The objections raised by plaintiff concerning his claims against Nelson, Explo, and Elite warrant further discussion.

II.

In his letter-form objections, plaintiff asserts that he is "positive that [he has] enough evidence to prove [his] case before a jury that [defendants] are guilty in damaging [his] health." (Objections at 2). Plaintiff points to the conclusions of Dr. Jin, whom he saw in March 2007, and Dr. Letz for proof that he "was exposed to hazardous amounts of Tetryl."[4] (Id.). Plaintiff also notes that other evidence, including sworn testimony, demonstrates that the munitions he hauled "contained chemicals that were known to be harmful." (Id.). Plaintiff contends that it is "impossible to determine" the amount of exposure inasmuch as the chemical has been removed from the coal mine. (Id. at 1). Finally, he emphasizes that he became ill in December of 2006, when he was first exposed to tetryl; that his symptoms persisted until February of 2007, when he ceased hauling the munitions; and that he was in excellent health prior to being exposed. (Id. at 1-2). Attached with his letter-form objections

[4] The record appears to lack any written report of Dr. Jin.

are numerous articles and published guidelines concerning the ill effects of tetryl exposure. Based on this additional evidence and the above assertions, plaintiff requests that defendants' motion for summary judgment be denied.

Plaintiff's objections and the evidence presented therewith do not overcome the deficiencies identified by the magistrate judge. To begin, plaintiff has offered insufficient evidence to establish that he was exposed to tetryl. The Supreme Court of Appeals of West Virginia has made clear that "[c]ritical to establishing exposure to a toxic chemical is knowledge of the dose or exposure amount and the duration of the exposure." Tolley v. ACF Indus., Inc., 212 W. Va. 548, 558, 575 S.E.2d 158, 168 (2002). Although Dr. Letz concluded that plaintiff was exposed to hazardous levels of tetryl, his reports indicate that he reached this conclusion solely as a result of plaintiff's general representation that he was regularly exposed to the chemical. Indeed, Dr. Letz appears to have no knowledge of any of the various factors that, according to the Supreme Court of Appeals, impact on the issue of exposure, including how often plaintiff was exposed, how close he may have been to the chemical, the type of ventilation available to plaintiff in his truck, and the level of exposure. Id. at 169. As the magistrate

judge correctly noted, Rule 26 requires that an expert give a basis for his or her conclusions. Fed. R. Civ. P. 26(a)(2)(B)(i). Inasmuch as Dr. Letz has failed to explain how he determined that plaintiff was exposed to tetryl, his expert report is insufficient. Accordingly, Dr. Letz's reports do not raise a genuine issue of material fact as to whether plaintiff was exposed to tetryl.

Perhaps even more damaging to plaintiff's claim is his failure to demonstrate that, assuming he was exposed to tetryl, the exposure was the actual and proximate cause of his illness. As noted by the magistrate judge, causation is a necessary element to each of plaintiff's remaining claims. See Aikens v. Debow, 208 W. Va. 486, 491, 541 S.E.2d 576, 581 (2000) (negligence); Morningstar v. Black & Decker Mfg. Co., 162 W. Va. 857, 883, 253 S.E.2d 666, 680 (1979) (strict liability); State ex rel. City of Martinsburg v. Sanders, 219 W. Va. 228, 232, 632 S.E.2d 914, 918 (2006) (medical monitoring); Travis v. Alcon Laboratories, Inc., 202 W. Va. 369, 375, 504 S.E.2d 419, 425 (1998) (IIED).[5] Moreover, plaintiff cannot survive a motion for

[5] The magistrate judge did not address the necessary elements of Count II (deliberate intent), which remains pending against Elite (though Elite was not his employer), and Count IV (fraud), which remains pending against Elite and Nelson. The court notes that plaintiff is required to demonstrate causation

summary judgment by offering "a mere possibility of causation." Tolley v. Carboline Co., 217 W. Va. 158, 162, 617 S.E.2d 508, 512 (2005). Rather, he must "produce some evidence sufficient to permit a finding of proximate cause based not on speculation, but upon the logical inferences to be drawn from the evidence." Id. (quoting McHale v. Westcott, 893 F. Supp. 143, 150 (N.D.N.Y. 1995)).

Plaintiff does not satisfy this standard. In particular, the reports of Dr. Letz demonstrate at most a mere possibility of a causal relationship between plaintiff's symptoms and any tetyrl exposure. Dr. Letz's January 20 letter, for instance, concludes only that plaintiff was exposed to hazardous levels of tetryl and that his "symptoms at the time of exposure (respiratory irritation with cough, nausea and fatigue) are consistent with what is published in the medical literature." (January 20 letter at 2). Dr. Letz's opinion that plaintiff's symptoms are consistent with those found to be associated with tetryl exposure is insufficient to demonstrate that those symptoms were caused by tetryl exposure. See Rutherford v.

---

to succeed on each of these claims. See Tolley v. Carboline Co., 217 W. Va. 158, 162, 617 S.E.2d 508, 512 (2005) (deliberate intent); Lengyel v. Lint, 167 W. Va. 272, 277, 280 S.E.2d 66, 69 (1981) (fraud).

Huntington Coca-Cola Bottling Co., 142 W. Va. 681, 692, 97 S.E.2d 803, 809 (1957) (holding that expert's testimony as to "possible" causal relationship is, standing alone, insufficient to establish such relationship). As to plaintiff's remaining symptoms, including his complaints of persistent fatigue and tremors, Dr. Letz concluded that there was likely no connection between these symptoms and his tetryl exposure. At best, then, Dr. Letz's reports demonstrate a mere possibility of causation, which is insufficient to satisfy plaintiff's burden of proof.

Given the lack of sufficient evidence of plaintiff's exposure to tetryl and the inability of his expert witness to connect plaintiff's alleged medical symptoms to the alleged exposure, the court is constrained to agree with the magistrate judge and conclude that defendants Nelson, Explo, and Elite are entitled to summary judgment.

III.

Accordingly, following a de novo review, the court concludes that the magistrate judge's recommended disposition is correct. It is therefore ORDERED as follows:

1. That the magistrate judge's PF&R be, and it hereby is, adopted and incorporated herein in its entirety;

2. That Catenary's motion for summary judgment be, and it hereby is, granted;

3. That Explo's motion for summary judgment, joined by Nelson, Explo, and Elite, be, and it hereby is, granted; and

4. That this action be, and it hereby is, dismissed and stricken from the docket.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record and any unrepresented parties.

DATED: March 22, 2011

John T. Copenhaver, Jr.
United States District Judge